

SUPREME COURT OF WISCONSIN
OFFICE OF LAWYER REGULATION

Public Reprimand With Consent

David A. Bordow
Attorney at Law

03-OLR-14

Attorney David A. Bordow, age 49, Milwaukee, represented a mother and minor daughter regarding injuries they sustained in a March 1999 automobile accident. In February 2000, the mother died from causes unrelated to the accident. She left little or no assets other than her personal injury claim and had no will. The only immediate relatives were two minor daughters and parents who lived in Iowa. No probate proceedings were immediately commenced.

Bordow continued to negotiate a settlement agreement with the other driver's insurer after learning of the client's death, although no estate proceedings had been commenced and no successor in interest had been appointed. In June 2000, Bordow agreed to accept a settlement of \$6,000 on behalf of the mother and \$1,500 on behalf of the minor child. Bordow did not consult with anyone prior to accepting the offers, but states that because the amounts were in excess of what the mother, prior to her death, had agreed she would accept, Bordow believed he was authorized to settle. By negotiating a settlement on behalf of a deceased client without any consultation with the client's successors in interest or with the daughter's father or guardian ad litem, Atty. Bordow violated SCR 20:1.2(a) which states that a lawyer shall inform a client of all offers of settlement and abide by a client's decision about whether to accept the offer.

The insurer sent Bordow a release that was to be signed on behalf of both the deceased client and daughter. The daughter's father signed the release on August 6, 2000 on behalf of the daughter, but no one had been empowered to sign on behalf of the deceased client. Bordow took no steps to have anyone appointed, did not return the release to the insurer, and made no request for payment of the settlement amounts.

In January 2001, the father appeared at Bordow's office and demanded payment of his daughter's settlement. Although no settlement proceeds had been paid by the insurer, Bordow wrote the father a trust account check in the amount of \$798.50. Bordow had the father sign a receipt showing that the balance of the \$1,500 settlement would be used to pay a medical lien in the amount of \$326.50 and legal fees in the amount of \$375.

There were sufficient funds on deposit in Bordow's client trust account for other clients so that the \$798.50 check did not cause an immediate overdraft in the trust account, but the check did cause a shortfall in funds that Bordow should have been holding for other clients. By failing to hold other clients' funds in trust and instead using other clients' funds to cover a check to a party who had no funds on deposit in the trust account, Bordow acted contrary to SCR 20:1.15(a), which requires a lawyer to hold in trust property of clients and third persons that is in the lawyer's possession in connection with a representation.

Even after paying the father, Bordow still failed to seek payment from the insurer or take steps to empower anyone to act for the deceased client, and there continued to be a shortfall in Bordow's client trust account for the next six months. On June 11, 2001, two checks were presented for payment that caused the first overdraft in Bordow's client

trust account. The bank honored the checks, but reported the overdraft to the Office of Lawyer Regulation (OLR).

The day after the overdraft occurred, Bordow finally contacted the insurer to request payment. Bordow sent a fax to the insurer confirming that his office would satisfy the medical liens on both claims prior to paying out the settlement proceeds. Bordow's statement was not true, as Bordow had already paid out the daughter's proceeds but had not paid the medical lien. He had, however, withheld \$326.50 from the check written to the father for the purpose of paying the lien. By misrepresenting to the insurer that his office would satisfy liens prior to paying out the settlement proceeds when he knew that he had already paid out the daughter's proceeds without satisfying the lien, Bordow violated SCR 20:4.1(a) which states that in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact to a third person.

The insurer thereafter issued settlement checks in the amounts of \$1,500 for the daughter and \$6,000 for the mother. Bordow had to obtain an endorsement on the daughter's check before it could be deposited to his trust account, however, and in the meantime two further overdrafts occurred in Bordow's trust account. The trust account remained in overdraft status from June 14, 2001 until July 3, 2001, when the daughter's settlement check was finally deposited.

Bordow had instructed the insurer to make the \$6,000 settlement check payable to the decedent's mother in Iowa, and he obtained her endorsement on the check through the mail. He did not subsequently deposit the check to his trust account, however, after being informed by the court that he would have to commence a special administration to

distribute the settlement proceeds. Bordow did not take action to commence a special administration, and the settlement check became stale.

In October 2001, OLR staff wrote to Bordow requesting information. Shortly thereafter Bordow returned the stale \$6,000 check to the insurer and requested that a replacement check be issued. In January 2002, approximately 1½ years after Bordow had reached the settlement agreement, Bordow filed a petition for special administration of the deceased client's estate. Bordow was appointed as special administrator, received a replacement check from the insurer, and distributed the proceeds.

By failing to timely take steps to determine the deceased client's successors in interest and to obtain and distribute the proceeds of a settlement he had negotiated, Bordow violated SCR 20:1.3 which states that a lawyer shall act with reasonable diligence and promptness on behalf of a client.

FAILURE TO CREATE AND MAINTAIN REQUIRED TRUST ACCOUNT RECORDS

In the course of OLR's investigation, OLR staff requested Bordow to produce his trust account records. Bordow provided no general journal or check register and acknowledged that he did not keep any journal other than individual client ledgers. Bordow was able to locate only some of his bank statements and had to order missing records from his bank. Bordow stated that in many months his office never bothered to open the monthly bank statements and some had been misplaced. OLR also inquired about the ownership of \$753.71 that was on deposit in Bordow's trust account as of January 1, 2001 for which no client ledgers were provided. Bordow has stated that approximately \$200 of this amount represents interest that had been on deposit in the

account for several years, since before it became an IOLTA account. Bordow is unable to identify the ownership of the balance of the funds.

Even after the overdrafts occurred and OLR was investigating, Bordow failed to make changes that would bring him in compliance with trust account record-keeping requirements. When OLR requested trust account records in October 2002 to determine what changes Bordow might have made, Bordow still had not retained all his bank statements and cancelled checks and told OLR that he would have to obtain copies from his bank.

By failing to create and maintain required trust account records, and by failing to keep any records that would identify the ownership of \$753.71 on deposit in Bordow's client trust account as of January 1, 2001, Atty. Bordow violated the record-keeping requirements of SCR 20:1.15(e).

FAILURE TO COOPERATE WITH OLR

On January 1, 1999, an Overdraft Notification Program was established by the Wisconsin Supreme Court. As of that date, all members of the State Bar of Wisconsin engaged in the private practice of law were required to obtain an agreement from their respective banks to report any overdrafts to the Office of Lawyer Regulation and to file that agreement, along with an Exhibit A, with OLR. As of June 11, 2001, when the first overdraft occurred in Bordow's trust account, Bordow had not filed the required agreement. Staff requested that Bordow file the missing agreement in letters dated June 18, 2001; June 28, 2001 and October 15, 2001. Bordow did not file the required forms until November 20, 2001, explaining that he thought his bank would submit them. OLR staff also learned that after the overdrafts had occurred in his own client trust account,

Bordow had sometimes used his brother's client trust account for client transactions. There was also no overdraft reporting form on file for that account. By failing to timely file an overdraft reporting form and Exhibit A for trust accounts that he used for client funds, Atty. Bordow violated SCR 20:1.15(n) which states that every lawyer shall comply with the reporting and production requirements of the overdraft rule.

Bordow also provided an incomplete and misleading explanation regarding the cause of the initial overdraft in his trust account. He stated in a letter to OLR:

The overdraft resulted from a single transaction which involved a client who came in, signed a release and received his minor daughter's portion of a payment by an insurance company. Unfortunately, the insurance company had not forwarded the check draft with the release and Mr. Bordow inadvertently disbursed funds without confirming receipt and deposit of the corresponding draft.

In fact, Bordow had obtained the father's signature on the release in August 2000, but Bordow did not disburse the funds until January 2001, when the father appeared in Bordow's office and demanded payment. Bordow still failed to request payment for another six months. Bordow knew that he still had not determined the mother's successors in interest and would have had no basis to believe that the daughter's settlement funds were on deposit in his trust account at the time he paid the father.

Staff also made repeated requests for information and for Bordow's trust account records to which Bordow failed to timely and fully comply, resulting in staff having to repeat requests two or three times. On at least three separate occasions staff requested an explanation as to the ownership of funds in his trust account to which Bordow failed to accurately respond or to acknowledge that he was unable to respond. In response to both October 2001 and October 2002 requests for all his individual client ledgers, Bordow provided only some of client ledgers and then provided additional ledgers in response to

follow-up requests. In response to an October 2002 request for bank statements and cancelled checks, Bordow first stated that he was providing the requested documents, yet he did not enclose them with his letter or under separate cover. When staff made further requests, Bordow then claimed it would be a hardship to comply because he'd have to pay to obtain the records from his bank.

By providing an incomplete and misleading explanation as to the cause of the overdrafts in his trust account, and by failing to timely produce trust account records and other information in response to requests from staff, Atty. Bordow violated SCR 22.03(6) which states that in the course of the investigation, the respondent's willful failure to provide relevant information, to answer questions fully, or to furnish documents, and the respondent's misrepresentation in a disclosure, are misconduct.

For the above misconduct, and in accordance with SCR 21.09(2), Attorney David A. Bordow is hereby publicly reprimanded.

Dated this 6th day of November, 2003.

SUPREME COURT OF WISCONSIN

/s/
John A. Fiorenza, Referee